92-1165

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

No._____

FRED C. SANDERS,

Petitioner

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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January 4, 1992

451P

QUESTIONS PRESENTED

I. Is a 1989 plea of guilty to Involuntary Manslaughter by Fred C. Sanders, a Catholic elementary school teacher, knowingly and intelligently made when he was never charged with Involuntary Manslaughter, nor were the elements of the crime or required underlying crime under the Indiana law ever explained to him and where in 1992 a federal civil jury found that Indianapolis police officers, including the decedent, on a dog complaint, used excessive force at his front door and inside his house (prior to the shooting of the officer in his home), so by definition, he is not guilty by reason of self defense and further, the same federal civil jury found the police supervisors failed to stop the beating and had conspired to cover up the incident under a Code of Silence and deny Mr. Sanders free access to Courts and awarded a total civil judgment of $1.5 million against six culpable police officers?

II. Should Sanders be presumed to know the elements of the crime of Involuntary Manslaughter because in the generic sense it is a lesser included offense of the charged crime of Murder?

III. Should Sanders be presumed to know the elements of the uncharged crime and its underlying crime because he is a school teacher and has an undergraduate and Masters Degree in elementary education?

IV. Should Sanders be presumed to have made a knowingly and intelligent plea where the trial court did not explain the elements of the crime or its underlying basis, but in many cases a defendant's lawyer would have made such an explanation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Fred S. Sanders, and the Respondent, State of Indiana.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The Petitioner, Fred C. Sanders, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in the above-entitled proceeding on July 20, 1992 and Petition For Rehearing was denied October 14, 1992.

OPINIONS BELOW

The opinion of the trial judge granting Post-Conviction Relief to Sanders is unreported and is reprinted in the appendix hereto, p. A-1, *infra*.

The decision of the Court of Appeals of Indiana affirming the trial court is reported at 587 N.E.2d 166 and is reprinted in the appendix hereto, p. A-4, *infra*.

The Supreme Court of Indiana vacated the opinion of the Court of Appeals and reversed the trial judge is reported at 596 N.E.2d 225 and is reprinted in the appendix hereto, p. A-15, *infra*.

JURISDICTION

The Petitioner, as an incarcerated prisoner, filed his Petition for Post-Conviction Relief in the trial court as provided by Indiana Rules. The Petition was denied by the State and proceeded to hearing on the 15th day of February, 1991. Thereafter, on May 10, 1991, the trial court granted Sanders' Petition for Post-Conviction Relief stating his plea of guilty to Involuntary Manslaughter entered January 31, 1989 was not freely, knowingly and intelligently entered in violation of his constitutional rights as well as in violation of I.C. 35-35-1-2.

Respondent appealed, and the Court of Appeals of Indiana affirmed the trial court's order granting Post-Conviction Relief. Respondent petitioned for transfer to the Supreme Court of Indiana which vacated the opinion of the Court of Appeals and reversed the trial court, which opinion was handed down on July 20, 1992. A timely petition for rehearing was sought by Petitioner and rehearing was denied October 14, 1992.

The jurisdiction of this Court to review this final judgment of the Supreme Court of Indiana is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the Fourteenth Amendment of the United States Constitution as well as Indiana Code provision I.C. 35-35-1-2 are reproduced in full in the appendix, p. A-21, *infra*.

STATEMENT OF THE CASE

This case was initiated by Fred C. Sanders on the 24th day of October, 1990 by filing a Petition for Post-Conviction Relief under the Indiana Rules of Procedure for Post-Conviction

Remedies in an attempt to clear his name. Under the Indiana Rules, the petition is filed in the trial court having criminal jurisdiction using the same cause number but it is essentially a civil proceeding against the State. Sanders sought a reversal of his guilty plea on the basis that it was not knowingly and intelligently entered in violation of his due process rights under the Fourteenth Amendment of the United State Constitution as well as in violation of the applicable Indiana statute relating to guilty pleas. At the time, he was serving a seven (7) year sentence on the plea to Involuntary Manslaughter. The prosecutor for Marion County, Indiana appeared and contested the Petition.

The Fred C. Sanders case has been one of the most high profile and highly publicized events occurring in Indianapolis in several decades. On August 14, 1988 Sanders, a thirteen (13) year parochial grade school teacher at St. Luke Catholic Church School, lived alone at 2968 Arthington Boulevard, Indianapolis. Shortly after 8:30 o'clock p.m. on the extremely hot Sunday evening, his thirteen year old dog barked at a passing juvenile on a bicycle. The juvenile climbed on an automobile which set off a burglar alarm, all of which resulted in a neighbor calling the Indianapolis Police Department to complain about Sanders' dog. An Indianapolis patrol officer responded to this order maintenance call and interviewed the Complainant as well as Sanders. The officer and Sanders discussed dog leash laws as found in an Indianapolis City Ordinance, the violation of which can only result in a civil summons.

After being assured he was not under arrest, Sanders then went into his home. Patrol Officer Faber put his foot in the door so it would not close all the way. The officer began striking Sanders with his police PR-24 baton and spraying him with mace. Other officers responded to Faber's call for assistance. Three officers at the front door sprayed more CS Gas and repeatedly struck Sanders (who was inside his house) with nightsticks and flashlights. Three police officers pushed in the front door. Two other officers broke into the back door of the house.

Sanders, who was bloodied and hurt and in fear of his life, crawled several feet and obtained a shotgun. Thereafter in extremely close proximity, Sanders fired one shot from a shotgun and officers fired nine or more shots from their service revolvers at Sanders. The instantaneous cascade of shots resulted in Sanders being wounded in the upper right chest and three times in the lower left leg. Officer Faber was wounded in the upper back as he turned away from Sanders and subsequently died. All of this occurred at one end of Sanders twelve foot living room.

Sanders was arrested in the hospital. Charges were refiled by the Marion County Prosecutor on August 26, 1988 in four counts, namely Murder, two counts of Attempted Murder, Class A felonies and one count of Resisting Law Enforcement, causing injury as follows:

"COUNT I

did knowingly kill another human being, to-wit: MATTHEW J. FABER, by shooting a deadly weapon, to-wit: A SHOTGUN, at and against MATTHEW J. FABER, thereby inflicting mortal injury upon MATTHEW J. FABER, causing MATTHEW J. FABER to die on August 23, 1988, all of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

COUNT II

The affiant aforesaid, upon his oath aforesaid, further says that FRED C. SANDERS on or about the 14th day of August, A.D. 1988, at and in the County of Marion in the State of Indiana did attempt to commit the crime of Murder, which is to knowingly kill another human being, to-wit: KENT KNAPP, by engaging in conduct, to-wit: knowingly shooting a deadly weapon, to-wit: A SHOTGUN, at and toward KENT KNAPP, which constituted a substantial step toward the commission of said crime of Murder, all of which is contrary to the form of the statute

in such case made and provided and against the peace and dignity of the State of Indiana.

COUNT III

The affiant aforesaid, upon his oath aforesaid, further says that FRED C. SANDERS on or about the 14th day of August, A.D. 1988, at an in the County of Marion in the State of Indiana did attempt to commit the crime of Murder, which is to knowingly kill another human being, to-wit: LARRY FENDER, by engaging in conduct, to-wit: knowingly shooting a deadly weapon, to-wit: A SHOTGUN, at and toward LARRY FENDER, which constituted a substantial step toward the commission of said crime of Murder, all of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

COUT IV

The affiant aforesaid, upon his oath aforesaid, further says that FRED C. SANDERS on or about the 14th day of August, A.D. 1988, at and in the County of Marion in the State of Indiana did knowingly and forcibly resist, obstruct, or interfere with MATTHEW J. FABER, a law enforcement officer with the Indianapolis Police Department while said officer was lawfully engaged in his duties as a law enforcement officer, and while committing said crime of Resisting Law Enforcement, FRED C. SANDERS did use a deadly weapon, to-wit: A SHOTGUN, all of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana."

On the same day, Marion County Prosecutor, Stephen Goldsmith, filed an Information for Death Sentence pursuant to I.C. 35-50-2-9 stating that Sanders committed the crime of murder with one of the statutory aggravating circumstances that the person who died was a law enforcement officer acting in the course of duty as follows:

"BE IT REMEMBERED, That, on this day before me, STEPHEN GOLDSMITH, Prosecuting Attorney of the Nineteenth Judicial Circuit, personally came NORMAN MATTHEWS who being duly worn, upon his oath, says that FRED C. SANDERS on or about the 14th day of August A.D. 1988, at and in the County of Marion in the State of Indiana, did commit the crime of Murder as heretofore alleged in this cause; and in the commission of said Murder, the following aggravating circumstance did exist:

The victim of the murder, MATTHEW J. FABER, was a law enforcement officer, to-wit: a police officer for the City of Indianapolis Police Department, and MATTHEW J. FABER was acting in the course of duty.

WHEREFORE, the State of Indiana respectfully prays that the defendant in this cause, FRED C. SANDERS, be sentenced to death."

On January 27, 1989 Sanders' then criminal counsel and the Marion County Prosecutor filed a mimeographed form Plea Agreement stating that Sanders agreed to plead guilty to a charge or count of Involuntary Manslaughter, a Class C Felony. Sanders, at the request of his then counsel, had signed the mimeographed form and initialed the laundry list of constitutional rights he was purportedly waiving.

On January 31, 1989 a hearing was held in the Marion Superior Court, Criminal Division, Room 2, before the Honorable Webster L. Brewer, duly elected Judge of such Court. The State of Indiana appeared by Mr. Stephen Goldsmith, Prosecuting Attorney of the Nineteenth Judicial Circuit, State of Indiana, and Ms. Joy Tolbert and Mr. David Cook, Deputy Prosecuting Attorneys. The defense appeared by Messrs. Owen M. Mullin and Robert Hammerle. Sanders appeared in person.

The four felony charges of Murder, Attempted Murder and Resisting with bodily injury, as drafted by the Marion County

Prosecutor, were still pending. The Capital Murder count had been dropped by the Prosecutor. No new counts or an amending count to one of the existing counts had been filed in Court.

The only charges pending against Sanders were those crafted by the Prosecutor which alleged that Sanders had knowingly killed another human being and had attempted to commit the crime of murder which is to knowingly kill another human being, as well as the fourth count of knowingly resisting, obstructing or interfering with a law enforcement officer by the use of a deadly weapon.

The drama unfolded in a packed Courtroom as follows:

"TUESDAY, JANUARY 31, 1989:

AT 9 O'CLOCK, A.M., COURT CONVENED, PURSUANT TO ADJOURNMENT, AND THE FOLLOWING PROCEEDINGS WERE HAD IN CAUSE NUMBER 49G028808CF92694, STATE OF INDIANA VERSUS FRED C. SANDERS, IN THE MARION COUNTY SUPERIOR COURT, CRIMINAL DIVISION, ROOM TWO, BEFORE THE HONORABLE WEBSTER L. BREWER, JUDGE OF SAID COURT, TO-WIT:

THE COURT: State of Indiana versus Fred Sanders. "Z", please don't let anybody else in, okay, until we have vacant seats. Sir, are you Mr. Fred Sanders?

MR. SANDERS: Yes, I am.

THE COURT: Let the record show comes Mr. Fred Sanders in person and by counsel, Mr. Mullin, Mr. Hammerle, State by Mr. Goldsmith Mr. Cook, and Ms. Tolbert. Is there a motion, Mr. Hammerle?

MR. HAMMERLE: Yes, sir, there is. Your Honor, pursuant to a Plea Agreement, which is filed with this Court and signed by Mr. Sanders, and the State, Mr. Sanders would ask leave to withdraw his plea of not guilty and enter a plea of guilty to the offense of Involuntary Manslaughter, a Class C Felony, pursuant to the terms set out in the Plea Agreement before you.

THE COURT: Okay. What's the State recommending?

MR. GOLDSMITH: The State's recommending that the acceptance of a Involuntary Manslaughter, Class C Felony, each side to argue for what it believes to be the appropriate penalty, to be determined by the Court.

THE COURT: Okay. Mr. Sanders, why do you want to plead guilty?

MR. SANDERS: Judge, I had recklessly pointed a shotgun at an officer.

THE COURT: No, no. First of all, are you guilty of this crime?

MR. SANDERS: I am guilty of Involuntary Manslaughter.

THE COURT: Okay. Mr. Cook, would you read the information, to make sure Mr. Sanders knows exactly what he's pleading guilty to?

MR. COOK: The information for which he is charged or the . . .

THE COURT: No, for which he is pleading.

MR. COOK: . . . pleading guilty, Judge?

THE COURT: Sure.

MR. COOK: Pursuant to Indiana Code 35-42-1-4, entitled Involuntary Manslaughter, "A person who kills another human being while committing or attempting to commit (1) a Class C or Class D Felony that inherently poses a risk of serious bodily injury; (2) a Class A Misdemeanor that inherently poses a risk of serious bodily injury; or (3) battery, commits involuntary manslaughter, a Class C Felony. However, if the killing results from the operation of a vehicle, the offense is a Class D Felony".

THE COURT: Mr. Sanders, do you understand the information?

MR. SANDERS: Yes, I do.

THE COURT: Do you understand by pleading guilty you are admitting as true everything that Mr. Cook has alleged?

MR. SANDERS: Yes, sir."

The hearing continued and the Judge went down the laundry list of constitutional waivers. The Prosecutor read the Probable Cause Affidavit upon which the Murder charges were based. Thereafter, the Court accepted the Plea Agreement and sentenced Sanders to a seven year term under the Involuntary Manslaughter statute having found aggravating but no mitigating circumstances.

On the 24th day of October, 1990, Sanders filed his sworn PC-1 Petition. The Petition set out the fact basis as follows:

"8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence:

(a) The Petitioner did not knowingly, voluntarily, and intelligently enter a plea of guilty in this cause to the crime of involuntary manslaughter.

9. State concisely and in the same order the facts which support each of the grounds set forth in (8).

(a) At the time of my guilty plea in this Court on January 31, 1989, neither the State of Indiana, the Court, nor my counsel, fumished to me in writing or read to me an information setting out the crime to which I was pleading guilty. In particular, the underlying crime which must be the basis of the crime of involuntary manslaughter was not set out. Neither the State of Indiana, the Court, nor my counsel informed me the necessary elements for any such underlying crime.

The only thing the State did, when asked by the Judge to read me the information was read the Indiana Code, § 35-42-1-4 entitled, "Involuntary Manslaughter". See pages 4 and 5 of the Transcript Of Guilty Plea attached hereto as "Exhibit A". The Court then asked me if I understood the information and I said, "yes" but there was no information and I did not understand. The Court then asked me if I understood that I was pleading guilty to and admitting as true everything that Mr. Cook, the Chief Deputy Prosecutor, had alleged which I said, "yes" but there was nothing alleged, nor an information read nor facts given and I did not understand. See page 5 of Exhibit A.

From the time of the incident on August 14, 1988 until the present, I have told everyone that I was being beaten and

acted in self-defense. I said this to Officer Bastian who was the first police officer who interviewed me at the hospital that night. I have never deviated nor will I ever deviate from this truth: I acted in self-defense. My counsel advised me that this was an absolute defense and I would not be convicted of murder.

My counsel, Owen Mullin, came to me one Thursday evening in January of 1989 and said he was not ready to try the case in February, 1989. He stated he had arranged a plea bargain and I could plead guilty to involuntary manslaughter. I told him I was not guilty of any crime and wanted to proceed to trial in February. He said he was not ready to try the murder charge.

He then told me I was guilty of involuntary manslaughter, as I had acted recklessly. I understood, as a layman, "reckless" to mean lack of proper caution, or careless. I defended myself from the assault of the police. My counsel advised me that what I did was carelessness and I was, thus, guilty of involuntary manslaughter.

I was never advised that "reckless" or "recklessly", in the context of culpability under Indiana Criminal Law means "plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Had I been advised by my counsel, the Court, or the Prosecutor, this was the underlying element of the crime, I would never have pleaded guilty.

I did not act in a "plain, conscious, and unjustifiable disregard of harm". I was acting in self-defense to stop the police officers who were assaulting me. My conduct did not involve a substantial deviation from acceptable standards of conduct. Any person in my circumstance who had not as yet been beaten senseless and into submission would have defended themselves as I did.

At that instant, I feared for my life. I feared that if I did

not stop the assault by the three police officers who had entered my home, I would have been subjected to further serious bodily injury which could have resulted in my death.

Since no information was prepared by the State, there was no charge against me to which I was pleading guilty. There was no factual basis for the plea on my part to a non-existent charge. Judge Brewer had also heard evidence of the police misconduct in preliminary hearings. He thus knew there was no factual basis for this plea and should not have accepted it."

Sanders, by his new counsel, also filed his Motion For Change Of Venue From The Judge. Sanders and the State struck Judges and thereafter Hon. Fredrick R. Spencer became Special Judge. The Petition was heard on February 15, 1990. The trial court entered an Order on the 10th day of May, 1991 granting Sanders' Petition for Post-Conviction Relief in that his Plea of Guilty to Involuntary Manslaughter entered January 31, 1989 was not freely, knowingly and intelligently entered in violation of his constitutional rights as well as in violation of I.C. 35-35-1-2(a)(1). Sanders, however, remained in jail after the May 10 Order on the original charges of murder, attempted murder and felony battery, which had never been dismissed by the State after the Plea to Involuntary Manslaughter.

Within five (5) days of the Order granting Post-Conviction Relief, Sanders filed a motion for early trial and a Trial Readiness Certificate. The State chose not to try Sanders on the original or any other charge within sixty (60) days but elected to appeal the Post-Conviction Relief. This Court released Sanders upon his own recognizance on the 27th day of June, 1991 because of the State's refusal to go to trial.

The Court of Appeals of Indiana sustained the trial court on February 27, 1992 as reported at 587 N.E.2d 166 on the constitutional issue that Sanders did not knowingly and intel-

ligently enter a plea of guilty under the circumstances of the admitted facts from the Record. Again, the State chose not to try Sanders on the pending charges or any others but petitioned for transfer to the Supreme Court of Indiana. A year thus passed, during which time Sanders was not incarcerated but under pending charges with a request for speedy trial but he was not brought to trial.

The Supreme Court reversed the trial court as well as the Court of Appeals of Indiana on July 20, 1992 as reported at 596 N.E.2d 225 on an evidentiary point but failed to recognize the important and significant constitutional issue involved. Sanders moved the Supreme Court for rehearing. On the 14th day of October, 1992 the Supreme Court of Indiana denied the Petition For Rehearing without opinion. This is thus a final judgment of the highest court of Indiana having jurisdiction of the case.

Mr. Sanders remains free on his own recognizance. He has been unable to return to teaching but is a full-time field engineer doing both field and lab work for an environmental engineering company in Indianapolis. He awaits the final decision as to whether he can go to trial to clear his name or return and spend the remaining seven (7) plus months incarcerated in the Indiana prison system under the plea agreement.

A postscript to this story has occurred since the Petition To Reconsider was overruled by the Supreme Court of Indiana. In May of 1989, Mr. Sanders brought an action in the United States District Court for the Southern District of Indiana, Indianapolis Division, under 42 U.S.C. §1983. The complaint named the City of Indianapolis and twenty-two (22) police officers. Various claims were voluntarily dismissed and several individuals were dismissed by the trial court.

The case went to trial by jury in District Court beginning November 16, 1992. During the trial, the claim against the City of Indianapolis was dismissed by the trial court. On November 23, 1992, the jury returned a verdict against six (6) individual

police officers in the total sum of $1.5 million. The verdict included a judgment against Sergeant Kenneth Knapp in the amount of $350,000.00 and Officer Larry Fender in the amount of $150,000.00 for the use of excessive force at and immediately inside Mr. Sanders' front door (prior to the shooting). The verdict also included a judgment against two police officers for the use of excessive force on Mr. Sanders' porch and front yard (after he exited his house and surrendered to police officers). The jury also found against four (4) Sergeants as supervisors who failed to intervene when Mr. Sanders was being subjected to excessive force after he suffendered. The verdict also included a judgment against six (6) police officers who conspired to conceal facts and destroy evidence and thereby deny Mr. Sanders free access to the courts. Judgment was entered against police officers upon the jury verdict on November 24, 1992.

REASONS FOR GRANTING THE WRIT

It has been sixteen (16) years since this Court's landmark decision in *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In the past sixteen years since that decision, prosecutors, states attorneys, state courts and even courts of appeals have taken a restrictive approach to the holding. It is time to revisit *Henderson v. Morgan* and answer the question whether it is restricted to its facts as to the mental capacity of the Petitioner, whether highly intelligent people waive their rights, whether counsel is presumed to have explained the elements of an uncharged offense and whether a lesser included offense is relevant to a constitutional analysis.

A plea bargain standing alone is without constitutional significance. It is a mere executory agreement which until approved and entered as a judgment does not deprive an accused of liberty or any other constitutionally protected interest. It is the subsequent guilty plea and whether or not it is properly entered that implicates the constitution. Thus, only after a person has pleaded guilty is there a conviction and it is the conviction which gives rise to the deprivation of a person's

liberty. The constitutional question is thus whether the plea was properly entered and whether the deprivation of liberty is constitutional. *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437 (1984).

The law was clearly established at the time of the Sanders' Plea Agreement in January of 1989 that a plea agreement cannot support a conviction unless it was voluntary in a constitutional sense. The Constitution requires an intelligent admission which cannot be voluntary unless the defendant receives real notice of the true nature of the charges against him. Without notice of the nature of the charge against a defendant, or proof that he in fact understood the charge, the plea cannot be voluntary in the constitutional sense. This Court announced that broad principle in the case of *Henderson v. Morgan*. The Court said at page 2257:

> "We also accept petitioner's characterization of the competence of respondent's counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder. Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859.
>
> [3] The charge of second-degree murder was never formally made. Had it been made, it necessarily would have included a charge that respondent's assault was "committed with a design to effect the death of the person killed.""

Two other things are of note in the *Henderson* case. In that case the petitioner superintendent of the correctional facility argued that affirming the Court of Appeals would invite countless collateral attacks on pleas of guilty. In this case, the State

made the same argument and invited Indiana courts to put the stamp of approval on sloppy prosecutors' practice. In *Henderson*, this Court went on to state that the petitioner's fears of countless collateral attacks were exaggerated. The State's contention in this case that requiring separate Informations would bog down the system of justice is exaggerated as well.

Henderson, also answers the State's argument with regard to who pleads guilty, the defendant or his lawyer. The concurring opinion in *Henderson* says that it is too late in the day to allow a guilty plea based upon the consent of the defendant's agent — his lawyer. It is the defendant only who pleads guilty and the choice must be the defendant's. The Court said at page 2260:

> "Similarly, it is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent — his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and it is on his admission that he is in fact guilty that his conviction will rest.
>
> In this case the defendant's factual guilt of second-degree murder has never been established in any fashion permitted by the Due Process Clause of the Fourteenth Amendment."

The Supreme Court, in reversing and vacating the opinion of the Court of Appeals of Indiana and reversing the trial court totally ignored the *Henderson* case. The constitutional issue as raised in *Henderson* was relegated to one conclusory sentence. The Court justified its actions on procedural grounds ignoring the obvious constitutional violations. There is no question that Sanders was never charged with Involuntary Manslaughter.

There is no question that an element of Involuntary Manslaughter is recklessness which is defined as a substantial

deviation from accepted standards. It also requires an underlying crime. Sanders did not recklessly point a shotgun at the invading police officers within his home. He pointed the shotgun at them to stop them at a time he had suffered severe bodily injury at their hands and was in fear of his life.

Does the Indiana Supreme Court mean that intelligent people do not have constitutional rights? Does the Indiana Supreme Court mean that Defendants with private counsel who may have explained elements of a crime have no constitutional rights? Does the Indiana Supreme Court mean that a lesser included offense never need be explained at a plea hearing? How many other valid claims have been dismissed in state courts by reason of a restrictive view of the *Henderson* case.

Even a number of courts of appeals have distinguished and restricted the clear holding in *Henderson*. The Seventh Circuit has distinguished *Henderson* in *Hase v. United States*, 800 F.2d 123 (7th Cir. 1986) when it found that Hase was a successful businessman with a high school education. Thus, given this background, the court found it is "highly likely that he had some understanding of what the Judge was saying to him during the plea agreement".

The Eighth Circuit has found that *Henderson* had an "unusually low mental capacity" and has refused to give the *Henderson* case a broad interpretation. In *Moore v. Armontrout*, 928 F.2d. 288 (8th Cir. 1991), the Court said at 292:

> "We have previously refused to interpret *Henderson* broadly and we refuse to do so here. *See Wabash v. Solem*, 694 F.2d 155, 158 (8th Cir. 19922); *United States v. Nieuwsma*, 779 F.2d 1359, 1362 (8th Cir. 1985); *Gregory v. Solem*, 774 F.2d 309, 314-15 (8th Cir. 1985), *cert. denied*, 475 U.S. 1088, 106 S.Ct. 1475, 89 L.Ed.2d 730 (1986). We can apply the same language from *Gregory, supra* to the facts of the present case:
>
> *Henderson* is easily distinguished from the facts now before us. As Justice Stevens pointed out, the facts in

> *Henderson* were 'unique' because the state trial judge 'found as a fact that the element of intent was not explained to the respondent.' . . . Here, petitioner was charged from the beginning with [rape] and the state court made a specific finding of fact that the nature of the offense was fully understood by [petitioner]. The *Henderson* presumption that counsel explained the nature of the charge to the defendant lends strong support to that finding.
>
> *Gregory, supra*, 774 F2d at 315.
>
> Because petitioner has failed to satisfy the Strickland test discussed above, and because we are confident that petitioner's plea was completely voluntary, we affirm the decision of the district court and deny petitioner habeas corpus relief on this ground."

Thus the Courts of this country are misinterpreting the clear and broad constitutional mandate contained in *Henderson*. The Court should take this opportunity to grant certiorari in the Sanders case and give guidance to the lawyers and judges of the country as to constitutional due process requirements of a guilty plea. The unanswered questions in *Henderson* can easily be answered in Sanders and the Court should take this opportunity to do so.

CONCLUSION

For these various reasons, the Sanders Petition For Writ Of Certiorari should be granted. This is an important issue and this case gives the Court the opportunity to revisit *Henderson*.

Respectfully submitted,

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Appendix

STATE OF INDIANA	)	MARION SUPERIOR
	SS:)	COURT ROOM 2
COUNTY OF MARION	)	
FRED C. SANDERS	)	CAUSE NO.
vs	)	49G02-8808-CF-92694
STATE OF INDIANA	)	

ORDER GRANTING POST CONVICTION RELIEF

This case comes before the Court on Fred C. Sander's Verified Motion for Post Conviction Relief filled October 24, 1990. Sanders alleges that he "did not knowingly, voluntarily and intelligently enter a plea of guilty in this cause to the Crime of Involuntary Manslaughter." He further alleges:

"At the time of my guilty plea in this Court on January 31, 1989, neither the State of Indiana, the Court, nor my counsel, furnished to me in writing or read to me an information setting out the crime to which I was pleading guilty. In particular, the underlying crime which must be the basis of the crime of involuntary manslaughter was not set out. Neither the State of Indiana, the Court, nor my counsel informed me the necessary elements for any such underlying crime.

The only thing the State did, when asked by the Judge to read me the information was read the Indiana Code, §35-42-1-4 entitled, "Involuntary Manslaughter". See pages 4 and 5 of the Transcript of Guilty Plea attached hereto as "Exhibit A". The Court then asked me if I understood the information and I said, "yes" but there was no information and I did not understand. The Court then asked me if I understood that I was pleading guilty to and admitting as true everything that Mr. Cook, the Chief Deputy Prosecutor, had alleged which I said, "yes" but there was nothing alleged, nor an information read nor facts given and I did not understand. See page 5 of Exhibit A.

From the time of the incident on August 14, 1988 until the present, I have told everyone that I was being beaten and acted in self-defense."

The Court finds that Sander's allegations are true and correct; that he was not advised of the charge against him and further, he was not advised of the specific elements of the offense that he plead guilty to.

The Court is guided by decisions of the United States Supreme Court and our Supreme Court.

In *Henderson v Morgan* 426 US 637, 49 LEd2 108 (1976) The High Court held that ". . . clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him. . . ." 49 LEd2 at 114.

In *De Villez v State* 416 NE2 846 (1981) Justice DeBruler opined that it is not always necessary for the trial Judge to advise an accused of the elements of the offense, but it is always required that the record disclose that the defendant is aware of the true nature of the charge against him.

Sanders states under oath he did not know of the elements of the offense he plead guilty to. He was never formally charged with involuntary manslaughter.

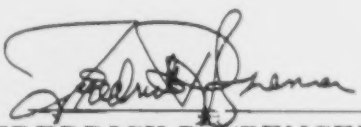
The Judge requested (at the Guilty Plea hearing) that the deputy Prosecutor read the charge against Sanders. He instead read the statute defining the crime of involuntary manslaughter, which has multiple parts and sub parts.

The Court finds that Sanders was not adequately advised of the nature of the offense to which he entered a plea of guilty. Further, no advisement of the elements of the offense were given to Sanders by the Prosecutor or the Trial Judge.

The Court grants Sanders Petition for Post Conviction Relief, his plea of guilty to Involuntary Manslaughter entered

on January 31, 1989 was not freely, knowingly and intelligently entered; and his right to know the nature of the charge against him was not fulfilled. IC 35-35-1-2 (a) (1). Sanders plea of guilty to Involuntary Manslaughter is ordered abrogated, rescinded and set aside.

Dated this the 10th day of May, 1991.



FREDRICK R. SPENCER,
SPECIAL JUDGE
MARION SUPERIOR COURT,
ROOM 2

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

STATE OF INDIANA	)	
Appellant-Respondent	)	
	)	
vs.	)	No. 49A02-9108-PC-324[1]
	)	
FRED C. SANDERS	)	
Appellee-Petitioner	)	

---

[1]This case was reassigned to this office on January 31, 1992.

APPEAL FROM THE
MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM TWO
The Honorable Frederick R. Spencer, Special Judge
Cause No. 49G028808-CF092694

ROBERTSON, J.

The State of Indiana appeals from an order granting Fred C. Sanders' petition for post-conviction relief. Sanders pled guilty to involuntary manslaughter for killing a police officer by shooting him in the back with a shotgun. He was sentenced to seven (7) years imprisonment. Sanders convinced the post-conviction court that his guilty plea was not entered knowingly, voluntarily, and intelligently because he had not received real notice of the true nature of the crime of involuntary manslaughter and was under the mistaken impression that self-defense was not available as a defense to involuntary manslaughter. We affirm.

FACTS

The factual basis for Sanders' plea was established at the guilty plea hearing by the reading of an abbreviated version of the affidavit of probable cause into the record as follows:

> Detective Norman Matthews swears or affirms that: On August 14th, 1988, at 21:19 a complainant called the Indianapolis Police Department in reference to a dog chasing neighborhood children. Officer Matthew Faber responded to the run and proceeded to [the complainant's address]. [The complainant] directed the officer to [the residence of Fred Carl Sanders, a white male, age 44] who the neighbors stated had three dogs that ran loose in the neighborhood chasing the children. Officer Faber approached the residence and confronted Mr. Sanders attempting to explain to him about the laws governing his dogs. At this time Mr. Sanders asked the Officer if he was under arrest to which the Officer stated 'No'. Mr. Sanders turned and headed towards the house. Officer Faber yelled for the

subject to stop but he continued into the residence at which time the Officer radioed for assistance. Officer Faber was able to wedge his foot in the door in an attempt to further stop the subject from fleeing. Sgt. Kent Knapp arrived on the scene to assist and, observing the officer pushing on the door, went to help him. Shortly after, Officer Larry Fender arrived on the scene and joined the other two officers at the front door of that residence in an attempt to effect the arrest. Officers Robert Ward and Marcus Kennedy also arrived at the scene and decided to go to the back to see if they could gain entry. At one point, Sgt. Knapp was able to reach into the front door far enough to get a grip on the subject but was unable to hold him. The officers in front of the residence sprayed CS repellent and swung a night stick in an effort to make the subject back off the door. Again, the subject was grabbed by Officer Faber, when the door opened enough, but again lost his grip and balance, falling to the floor. At this time, the subject fled backwards, towards the bedroom, reappearing with a 12 gauge shotgun and fired one blast at the officer as he was getting off the floor, striking him in the upper back. Sgt. Knapp and Officer Fender drew their weapons and returned fire, striking the subject in the upper chest and legs. Officer Faber never unholstered his weapon. Officer Robert Ward suffered lacerations to his hand after he attempted to enter the rear of the residence although it is uncertain at [the time this affidavit was executed] whether it was from shotgun pellets or the window he had broken. Officer Matthew Faber [was in critical condition at the hospital for nine (9) days and then died on August 23, 1988]. An autopsy was performed by Dr. Clark which resulted in the cause of death to be respiratory failure due to the gunshot wound to the chest which Officer Matthew J. Faber suffered in this incident, all of which occurred In Indianapolis, Marion County, Indiana.

Sanders was charged with murder. The State filed the neces-

sary pleadings to seek the death penalty alleging that Sanders' crime was a capital offense as Officer Faber was a law enforcement officer murdered in the line of duty. The State later dropped this capital murder count. In addition to the murder charge, Sanders was charged with two counts of attempted murder and one count of resisting law enforcement with bodily injury.

Much legal skirmishing followed resulting in the present seven (7) volume record filed in this appeal. On January 31, 1989, Sanders pled guilty to involuntary manslaughter as a lesser-included offense of murder in satisfaction of all the pending charges. He was never formally charged with involuntary manslaughter. On March 3, 1989, Sanders was sentenced to an enhanced term of seven (7) years imprisonment.

Additional facts are supplied as necessary.

DECISION

A post-conviction proceeding is a special quasi-civil remedy whereby a defendant can present an error which, for various reasons, was not available or known at the time of the original criminal proceedings. *McHugh v. State* (1984), Ind., 471 N.E.2d 293. Post-conviction proceedings are totally separate and distinct from the underlying criminal proceedings. *Phillips v. State* (1982), Ind., 441 N.E.2d 201. Post-conviction proceedings are governed by the rules and statutes applicable to civil proceedings and the petitioner has the burden of proving his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1 § 5; *State v. Clanton* (1982), Ind.App., 443 N.E.2d 1204. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Stewart v. State* (1988), Ind., 517 N.E.2d 1230.

When the State appeals from an order granting post-conviction relief, the standard of review for a negative civil judgment does not apply. *Id.* Our review of civil cases tried by the court without a jury is governed by Ind. Trial Rule 52(A) which reads, in pertinent part, as follows:

> On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The judgment of a trial court sitting without a jury will only be set aside if it is clearly erroneous; that is, that the record contains no facts or inferences supporting the judgment. *National Advertising Co. v. Wilson Auto Parts, Inc.* (1991), Ind.App., 569 N.E.2d 997.

The guilty plea court shall not accept a plea of guilty without first determining that the defendant understands the nature of the charge against him. Ind.Code 35-35-1-2(a)(1). A guilty plea must be knowingly, voluntarily, and intelligently entered. *Snowe v. State* (1989), Ind.App., 533 N.E.2d 613. The trial court must determine on the record that the defendant knows and understands the nature of the charge against him. *Id.*

A guilty plea is not voluntary if the defendant fails to receive adequate notice of the offense to which he pleads guilty. *Henderson v. Morgan* (1976), 426 U.S. 637. The defendant's plea of guilty cannot be voluntary in the sense that it constitutes an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 645, 646.

The requirement that the guilty plea court determine that the defendant is aware of the true nature of the offense to which he pleads guilty need not be satisfied by an advisement by the court of the separate elements of the offense; however, that is the encouraged method of satisfying the requirement. *DeVillez v. State* (1981), 275 Ind. 263, 416 N.E.2d 846. An admission of facts which constitutes an admission of each element of the offense will satisfy the requirement that the defendant understands the true nature of the charge. *Id.* In *DeVillez*, the defendant was charged with accessory before the fact to first

degree murder in the killing of her husband. She entered a plea of guilty to the lesser-included offense of second degree murder although she was never formally charged with second degree murder. Our supreme court held that the record of the guilty plea hearing clearly indicated that the defendant was on notice of the true nature of second degree murder as she had admitted in a written factual statement and admission that she had hired a man to murder her husband and had assisted him in doing so.

In *Brooks v. State* (1974), 161 Ind.App. 552, 316 N.E.2d 688, this court issued the ominous warning:

> When, however, a defendant is not pleading guilty to the specific crime charged, but rather to a lesser included offense, it is unwise indeed for the court not to advise on the elements of the included offense. To do otherwise is to invite reversal in the event that the defendant thereafter alleges that he did not understand the nature of the offense to which he has pleaded, as opposed to the crime charged.

161 Ind.App. at 560, 316 N.E.2d at 693.

In the present case, Sanders pled guilty to involuntary manslaughter as a lesser-included offense of murder. It is well-established that involuntary manslaughter is considered to be a lesser-included offense of murder. *Jewell v. State* (1989), Ind., 539 N.E.2d 959. However, Sanders was never formally charged by information or otherwise with involuntary manslaughter.

At the guilty plea hearing, the statute defining involuntary manslaughter statute was read into the record as follows:

> Pursuant to Indiana Code 35-42-1-4, entitled Involuntary Manslaughter, 'A person who kills another human being while committing or attempting to commit (1) a Class C or Class D Felony that inherently poses a risk of serious bodily injury; (2) a Class A Misdemeanor that inherently poses a risk of serious bodily injury; or (3) battery, commits involuntary manslaughter, a Class C Felony. However, if the killing results from the operation of a vehicle, the offense is a Class D Felony'.

At the guilty plea hearing, Sanders indicated that he was guilty of Involuntary Manslaughter stating: "Judge, I recklessly pointed a shotgun at an officer."

On October 24, 1990, Sanders filed his verified petition for post-conviction relief which, in pertinent part, reads as follows:

> 8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence:
>
> (a) The Petitioner did not knowingly, voluntarily, and intelligently enter a plea of guilty in this cause to the crime of involuntary manslaughter.
>
> 9. State concisely and in the same order the facts which support each of the grounds set forth in (8).
>
> (a) At the time of my guilty plea in this Court on January 31, 1989, neither the State of Indiana, the Court, nor my counsel, furnished me in writing or read to me an information setting out the crime to which I was pleading guilty. In particular, the underlying crime which must be the basis of the crime of involuntary manslaughter was not set out. Neither the State of Indiana, the Court, nor my counsel informed me the (sic) necessary elements for any such underlying crime.
>
> The only thing the State did, when asked by the Judge to read me the information was read the Indiana Code, §35-42-1-4 entitled, "Involuntary Manslaughter". See pages 4 and 5 of the Transcript Of Guilty Plea attached hereto as "Exhibit A". The Court then asked me if I understood the information and I said, "yes" but there was no information and I did not understand. The Court then asked me if I understood that I was pleading guilty to and admitting as true everything that Mr. Cook, the Chief Deputy Prosecutor, had alleged which I said, "yes" but there was nothing alleged, nor an information read nor facts given and I did not understand. See page 5 of Exhibit A.

From the time of the incident on August 14, 1988 until the present, I have told everyone that I was being beaten and acted in self-defense. I said this to Officer Bastian who was the first police officer who interviewed me at the hospital that night. I have never deviated nor will I ever deviate from this truth: I acted in self-defense. My counsel advised me that this was an absolute defense and I would not be convicted of murder.

My counsel, Owen Mullin, came to me one Thursday evening in January of 1989 and said he was not ready to try the case in February, 1989. He stated he had arranged a plea bargain and I could plead guilty to involuntary manslaughter. I told him I was not guilty of any crime and wanted to proceed to trial in February. He said he was not ready to try the murder charge.

He then told me I was guilty of involuntary manslaughter, as I had acted recklessly. I understood, as a layman, 'reckless' to mean lack of proper caution, or careless. I defended myself from the assault of the police. My counsel advised me that what I did was carelessness and I was, thus, guilty of involuntary manslaughter.

I was never advised that 'reckless' or 'recklessly', in the context of culpability under Indiana Criminal Law means 'plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.' Had I been advised by my counsel, the Court, or the Prosecutor, this was the underlying element of the crime, I would never have pleaded guilty.

I did not act in a 'plain, conscious, and unjustifiable disregard of harm'. I was acting in self-defense to stop the police officers who were assaulting me. My conduct did not involve a substantial deviation from acceptable standards of conduct. Any person in my circumstance who had not as yet been beaten senseless and into submission would have defended themselves as I did.

> At that instant, I feared for my life. I feared that if I did not stop the assault by the three police officers who had entered my home, I would have been subjected to further serious bodily injury which could have resulted in my death.
>
> Since no information was prepared by the State, there was no charge against me to which I was pleading guilty. There was no factual basis for the plea on my part to a non-existent charge. Judge Brewer had also heard evidence of the police misconduct in preliminary hearings. He thus knew there was no factual basis for this plea and should not have accepted it.

In the landmark case of *White v. State* (1986), Ind., 497 N.E.2d 893, our supreme court stated:

> We emphasize that a plea hearing conducted in accordance with Ind.Code § 35-35-1-2 is the best way to assure that a defendant's plea is made voluntarily and intelligently. A defendant fully armed with all the information outlined in the statute is most able to make the voluntary and intelligent decision which the Indiana and U.S. Constitutions entitle him to make. A plea entered after the trial judge has reviewed the various rights which a defendant is waiving and made the inquiries called for in the statute is unlikely to be found wanting in a collateral attack. On the other hand, pleas entered after coercion, judicial or otherwise, will be set aside. *Defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims for relief.*

497 N.E.2d at 905 (Emphasis added.) In *Reeves v. State* (1991), Ind.App., 564 N.E.2d 550, *trans. denied*, we held that a defendant who established that he was misled by his trial counsel to believe that the State could seek the habitual offender enhancement, when he was not habitual eligible, was entitled to post-conviction relief as his plea was involuntary.

In the present case, Sanders established (by convincing the post-conviction court) that he was misled by his trial counsel to believe that he was guilty of the crime of involuntary manslaughter despite his claim of self-defense. Sanders has also established that the State never put him on notice of the true nature of the crime of involuntary manslaughter. No information charging him with involuntary manslaughter was ever filed. At the guilty plea hearing, the statutory definition of involuntary manslaughter was read into the record. However, this statutory definition of involuntary manslaughter requires that the killing occur during the commission or attempt of one of several underlying crimes. Sanders was never put on notice of the nature or the elements of any of these possible underlying crimes.

The State asserts (without analysis or citation to authority) that the post-conviction court's judgment cannot rest on the record of the post-conviction hearing. The State implies that Sanders did not provide testimony necessary to establish his claim. Indiana Post-Conviction Rule 1(2) requires that the petition for post-conviction relief be verified. Sanders' petition was verified. Moreover, Sanders' verified petition was entered into evidence at the post-conviction hearing. On review, we can consider verified pleadings prepared by a defendant as evidence, even if the pleadings were never formally entered into evidence. *State v. Keith* (1985), Ind.App., 482 N.E.2d 751. In the present case, the post-conviction court's judgment may rest on Sanders' verified petition alone. Therefore, we find no error.

The fears we expressed in 1974 in *Brooks*, 316 N.E.2d 688, have been realized. The guilty plea court accepted Sanders' plea to a lesser-included offense without informing him of the elements of that offense. This has enabled Sanders to establish that he did not understand the nature of the offense to which he pleaded guilty.

Sanders carried his burden in the post-conviction court of demonstrating that his plea was not entered knowingly, volun-

tarily, and intelligently because he was under the misunderstanding that he was guilty of the crime of involuntary manslaughter despite his claim of self-defense. As the post-conviction court's judgment is supported by the evidence, we cannot conclude that the judgment is clearly erroneous. Therefore, we must affirm.

Judgment affirmed.

BAKER, J. AND HOFFMAN, J. CONCUR.

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IN THE
SUPREME COURT OF INDIANA

STATE OF INDIANA,	)	
Appellant,	)	Supreme Court No.
	)	49S02-9207-PC-563
v.	)	
	)	Court of Appeals NO.
FRED C. SANDERS,	)	49A02-9108-PC-324
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT,
CRIMINAL DIV. 2
The Honorable Frederick R. Spencer, Special Judge
Cause No. 49G02-0080-CF-092694

ON PETITION TO TRANSFER

KRAHULIK, J.

The State of Indiana (Appellant-Respondent below) petitions this Court to accept transfer of this case after the Court of Appeals affirmed the trial court's grant of Fred Sanders' (Appellee-Petitioner below) petition for post-conviction relief. The issue presented is whether the trial court's grant of relief setting aside Sanders' guilty plea is clearly erroneous because it is not supported by the evidence. We decide this issue in the State's favor and, therefore, reverse the order of the trial court and remand to the trial court with directions to deny Sanders' petition.

In August 1988, Sanders admittedly shot and killed an Indianapolis police officer, Matthew Faber, after Faber had forced entry, into Sanders' house and after he had identified himself as a police officer. As a result of this killing, the State charged Sanders with murder and sought the death penalty. Additionally, he was charged with two counts of attempted murder and one count of resisting law enforcement resulting in bodily injury. The State later dismissed the death penalty count and proceeded toward trial on the other four charges. Prior to trial, on January 31, 1989, Sanders pled guilty to involuntary manslaughter in exchange for the State's dismissal of all other charges. He was never formally charged with involuntary manslaughter, but pled guilty to involuntary manslaughter as a lesser-included offense of murder. Following a pre-sentence investigation, Sanders was sentenced to a term of seven years imprisonment.

Subsequently, on October 24, 1990, Sanders filed a verified petition for post-conviction relief in which he alleged that his plea of guilty to involuntary manslaughter was not knowingly, voluntarily, or intelligently made because "neither the State of Indiana, the Court, nor my counsel, furnished me in writing or read to me an information setting out the crime to which I was pleading guilty." Additionally, Sanders alleged in his petition that "neither the State of Indiana, the Court, nor my counsel, informed me the [sic] necessary elements for any such underly-

ing crime." The remainder of Sanders' petition alleged that he had never deviated from the defense that he was acting in self-defense. The petition also detailed conversations with Sanders' trial attorney in which he allegedly advised Sanders that he should accept the plea bargain and plead guilty to involuntary manslaughter. His petition further alleged that his counsel advised him to enter such a plea because counsel was not ready to try the murder charge and because Sanders was, in fact, guilty of involuntary manslaughter in that he had acted recklessly in causing the death of Faber. Sanders finally alleged in the petition that he was never advised of the legal definition of "reckless" or "recklessly", and that had he been so advised, he would not have pleaded guilty.

At the hearing on the petition, Sanders' counsel stated to the court his theory of the case which, in effect, was that the guilty plea should be set aside because at the time of the guilty plea hearing there was no charging document (either information or indictment) that charged Sanders with involuntary manslaughter. Sanders' legal premise was that, as a matter of law, a defendant cannot knowingly enter into a guilty plea to the charge of involuntary manslaughter unless there is an information or indictment charging him with the crime of involuntary manslaughter.

In support of that position, Sanders testified and was asked a total of eight questions. During his examination, he identified himself and his petition for post-conviction relief. Counsel then offered the petition into evidence. The State objected on the grounds that the petition simply constituted a pleading in the case and, therefore, should not be considered as evidence in the case. In response to that objection, Sanders' attorney replied as follows:

> Simply, your honor, *it is not for the truth of the matters stated* because there has been an answer and certain denials simply for the record of this proceeding introducing it in evidence as in effect the Petitioner Complaint by petitioner *and again not for the truth of the matters stated* . . . .

(Emphasis added.) With that understanding, the State no longer objected and the court admitted the petition into evidence. Additionally, the court admitted the plea agreement, as well as the State's answers to interrogatories and requests for admission, and the transcript of the guilty plea hearing. Sanders rested without any additional testimony on his part other than identifying the documents set forth above. The State called no witnesses.

In granting the petition for post-conviction relief, the trial court quoted at length from Sanders' petition and found that the allegations contained in Sanders' petition were true and correct, and that he was not advised of the charge against him or of the specific elements of the offense to which he pled guilty. The Court of Appeals affirmed in spite of the State's argument that Sanders did not provide testimony necessary to establish the claims contained within his petition. The Court of Appeals noted that Sanders' verified petition was entered into evidence at the post-conviction hearing, and, citing *State v. Keith* (1985), Ind. App., 482 N.E.2d 751, that the post-conviction court's judgment could rest on Sanders' verified petition alone. We disagree.

The crux of the problem presented in this case is that the verified petition was admitted into evidence *for a limited purpose*, and was specifically not being admitted into evidence for the truth of the matters contained within the petition. After admitting the petition into evidence with the understanding that it was not being admitted for the truth of the matters contained within the petition, the trial court erroneously considered the petition as if the petition had been admitted into evidence to prove the truth of the allegations contained therein. The Court of Appeals affirmed the trial court's judgment by committing the same error, viz. relying on evidence admitted for a limited purpose and not for the truthfulness of the facts alleged in order to support findings of fact. Both the trial and appellate courts were incorrect in utilizing the petition in this manner.

The Court of Appeals' reliance on *State v. Keith*, 482 N.E.2d 751, is misplaced. In *State v. Keith*, the Court of Appeals affirmed the trial court's dismissal of a felony charge based on principles of double jeopardy. The Court of Appeals relied, in part, on facts alleged in Keith's verified motion to dismiss. In support of this reliance the court said:

> In reviewing a related matter, our supreme court recently held that pleadings prepared by a defendant under oath and relied upon by the trial court *and the parties as* evidence could be considered as evidence by this court upon review even though the pleadings were never formally entered into evidence. *State v. Cleland* (1985), Ind., 477 N.E.2d 537.

482 N.E.2d at 754 (emphasis added). An examination of *State v. Cleland* (1985), Ind., 477 N.E.2d 537, leads us to conclude that the holding of that three-to-two opinion must be confined to the circumstances of that case and cannot be extended to stand for the proposition that a verified pleading admitted into evidence for a limited purpose, and not for the truth of the matters stated therein, may constitute evidence of the facts alleged in such pleading. This Court in *Cleland* explicitly so limited its holding, over the dissent of Justices Pivarnik and Givan, when it stated:

> We hold that inasmuch as the petitions were verified, *absent a timely objection by the State* and *under the circumstances* of this case, the court could properly consider them as evidence.

Id. at 538 (emphasis added). In order, however, that future courts not be misled by the holding in *Cleland*, we state that the better reasoned rule of law is that which Justices Pivarnik and Givan set forth in their dissent when they stated that a plaintiff cannot "maintain his position by pleading under oath and then resting on that pleading." 477 N.E.2d at 539. Thus, we hold that neither *Cleland* or *Keith* permitted either the trial court or the appellate court to rely on Sanders' petition as evidence of the facts alleged therein.

The prejudice to the State is apparent. Because the Sanders petition was not being admitted for the truth of the allegations recited in the petition, the State did not cross-examine Sanders or call Sanders' trial counsel in an attempt to refute or impeach the facts alleged in the petition. A new hearing on Sanders' petition for post-conviction relief would be required to allow the State the opportunity to rebut the claims made by Sanders in his petition. The State, however, argues that, absent the allegations of fact contained in the petition, the evidence is insufficient to establish that Sanders' guilty plea was not knowing, voluntary, or intelligent. Therefore, the State urges that he failed to prove his case and his petition must be denied. We agree.

When Sanders pled guilty to involuntary manslaughter, he was pleading guilty to a lesser-included offense of the crime of murder. *Jewell v. State* (1989), Ind., 539 N.E.2d 959. No separate information or indictment was necessary in order to put Sanders on notice of the charges. See, for example, *DeVillez v. State* (1981), Ind., 416 N.E.2d 846, in which this Court held that a plea to second degree murder did not require a separate and distinct charge of second degree murder. The court said:

> At the plea stage second degree murder is a necessarily included offense within a charge of first degree murder . . . Therefore, her knowledge of the true nature of the greater offense necessarily supplies sufficient knowledge of the true nature of the lesser and included offense of second degree murder.

Id at 849.

The evidence is undisputed that during the guilty plea hearing, the State read the statutory definition of involuntary manslaughter to Sanders. Also, the probable cause affidavit previously filed in the case was read to Sanders. This affidavit set out in detail the facts surrounding the killing. Following the reading of the statute and probable cause affidavit, Sanders was then asked specifically if he was pleading guilty to the crime charged. He replied in the affirmative. Additionally,

when asked why he felt he was guilty of involuntary manslaughter, Sanders demonstrated an understanding of the nature of the charge when he answered that he recklessly pointed a shotgun at Faber. This undisputed evidence from the transcript of the guilty plea hearing satisfies the constitutional requirement set forth in *Henderson v. Morgan* (1976), 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108, that Sanders was aware of the elements of the offense of involuntary manslaughter when he pled guilty. *See DeVillez*, 416 N.E.2d 846. Absent his verified petition, which was admitted not for the truth of the matters stated, but merely to set forth the allegations of his claim, there is not sufficient evidence to support the trial judge's determination that his plea was not knowingly, voluntarily and intelligently entered. Thus, the trial court's findings of fact were clearly erroneous and must be set aside. And, without those findings of fact, the judgment granting Sanders' petition must be reversed and remanded to the trial court with instructions to deny the petition.

Conclusion

Accordingly, we grant the State's Petition to Transfer, vacate the opinion of the Court of Appeals, reverse the trial court and remand this matter to the trial court to deny the petition for post conviction relief.

SHEPARD, C.J., DEBRULER, GIVAN and DICKSON, JJ., concur.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I.C. 35-35-1-2, is set out for ease of reference as follows: "Sec. 2. (a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

(1) understands the nature of the charge against him;

(2) has been informed that by his plea he waives his rights to:

(A) a public and speedy trial by jury;

(B) confront and cross-examine the witnesses against him;

(C) have compulsory process for obtaining witnesses in his favor; and

(D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(3) has been informed of the maximum possible sentence and minimum sentence of the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences; and

(4) has been informed that if:

(A) there is a plea agreement as defined by IC 35-35-3-1; and

(B) the court accepts the plea agreement

(b) A defendant in a misdemeanor case may waive the rights under subsection (1) by signing a written waiver. (c) Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty. *As added by Acts 1981, P.L. 298, SEC.4. Amended by P.L. 179-1984, SEC.1; P.L.313-1985, SEC.1.*"

For the purpose of this appeal, the pertinent provisions are Section 2(a)(1) requiring the defendant to understand the nature of the charges against him and Section 2(c) requiring a variance must violate a constitutional right if it is to be the basis of setting aside a plea of guilty.